

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RICHFIELD LANDFILL, INCORPORATED,

Plaintiff/Counterdefendant-Appellant,

v

STATE OF MICHIGAN and DEPARTMENT OF  
NATURAL RESOURCES,

Defendants/Counterplaintiffs-Appellees.

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UNPUBLISHED

January 26, 2001

Nos. 202774; 202777

Court of Claims

LC No. 93-015002-CM

Ingham Circuit Court

LC No. 91-069153-AZ

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RICHFIELD LANDFILL, INCORPORATED,

Plaintiff-Appellant/Cross-Appellee,

v

STATE OF MICHIGAN and DEPARTMENT OF  
NATURAL RESOURCES,

Defendants-Appellees/Cross-Appellants.

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No. 202775

Ingham Circuit Court

LC No. 91-069153-AZ

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right, and defendants cross-appeal, from the trial court's orders, on summary disposition, dismissing plaintiff's claims for damages under various theories, but ordering the Department of Natural Resources (DNR) to grant plaintiff an operating license for its new landfill facility. We affirm in part, reverse in part, and remand for further proceedings.

I

Facts and Procedural History

For many years, plaintiff operated a sanitary landfill in Genesee County. As plaintiff's original landfill (cell 1) was approaching the end of its useful life, plaintiff applied for a permit to construct a second landfill (cell 2) adjacent to the first. The DNR expressed concern about contaminants thought to be leaking from the first landfill, and after lengthy negotiations, plaintiff and the DNR entered into a consent order in 1989. The consent order set forth the steps required to close cell 1 and announced the DNR's approval of a specific engineering plan for the construction of cell 2. Further, the consent order provided that an operating license for cell 2 would be granted when plaintiff, among other things, redesigned cell 2 in order to satisfy certain requirements for monitoring groundwater.

In April 1991, a DNR official informed plaintiff by letter that it was not in compliance with the 1989 consent order and that an operating license would not be granted until plaintiff complied with DNR requirements.

The DNR demanded that plaintiff substantially reconstruct cell 2 with a “double liner/double leachate collection system” which would make it possible to differentiate any leakage from the new facility from any cell 1 leakage (“differential monitoring”).

Thereafter, plaintiff filed suit requesting an order of mandamus, or, alternatively, appeal of the administrative decision. Plaintiff asserted that the DNR’s denial of the license was arbitrary and capricious, and requested declaratory and injunctive relief. The trial court ruled that mandamus was not an appropriate remedy in this situation, and treated the case as an appeal under § 631 of the Revised Judicature Act, MCL 600.631; MSA 27A.631. In a November 1991 order, the court ruled that defendants could not compel plaintiff to implement differential monitoring in the form of a double-liner system, but that the DNR could require some other system of differential monitoring. The court further ruled that the DNR was arbitrary and capricious in denying an operating license for cell 2: “At Plaintiffs’ facility it is technically inappropriate to place wells between Cell 2 and Cell 1 and, as such, any monitoring wells required by Defendant may only be placed outside the boundaries of the combined Cell 1 and Cell 2 considered as a single landfill.” *Richfield Landfill, Inc v Dep’t of Natural Resources*, unpublished order of the Ingham Circuit Court, entered Nov. 8, 1991 (Docket No. 91-69153-AZ).

In subsequent proceedings, plaintiff argued that the DNR’s alternative proposals to the double-liner system were even more prohibitively burdensome than the double-liner system would have been, and advanced the theory that the DNR was retaliating against plaintiff because plaintiff asserted its rights in the matter.<sup>1</sup>

In 1993, plaintiff filed identical actions with the circuit court and the court of claims. In the new actions, count I alleged that the DNR was imposing the requirements of an unpromulgated rule, count II alleged breach of contract, count III alleged deprivation of property without due process, and count IV alleged a taking of property without just compensation. The two new actions were promptly consolidated with each other, and joined with the 1991 action, for resolution by the trial court. The DNR counterclaimed, alleging various statutory violations plus common-law public nuisance. Subsequently, the trial court dismissed from the case all the lower level officials and employees of the DNR on the ground that only the sovereign itself, not individuals acting on its behalf, could be sued for a regulatory taking. The court further ruled that plaintiff could not maintain an action for breach of contract but could seek specific performance of the consent order.

By way of its September 1996 order, the trial court granted defendants’ motion for summary disposition on counts III and IV of plaintiff’s 1993 cause of action, ruling that plaintiff had failed to state a valid claim under either 42 USC 1983 or under a regulatory-taking theory. Finally, the trial court entertained motions on February 25, 1997, and stated as follows:

It was March ‘91 when this case first arrived here, and I think that’s long enough.

\* \* \*

. . . [U]nder the statutory scheme that was in effect at the time of the application in this case the DNR, if it approved a design, was then obligated if the design as executed per . . . specifications[] to issue an operating license. Then, if after the operating license was issued, the DNR’s enforcement people had reason to believe that there were leaks, they could take various steps, and I have repeatedly made statements in this case . . . that if a reasonable and lawful differential monitoring system could not be proposed, then even though I suspect neither side really want to do this, the only alternative left would be to grant that operating license, and if a leak was detected anywhere on the . . . periphery of the combined Cell 1/Cell 2 area, the DNR could take whatever lawful measures it deemed appropriate, and I am afraid that’s where we have arrived.

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<sup>1</sup> The trial court acknowledged that “representatives of the parties did attempt, for a considerable period of time . . . to work out a mutually acceptable differential monitoring plan and ultimately they failed.”

In seven years no one has brought forth a proposal for a differential monitoring system that has been acceptable to the other side, and I have never ruled that anyone made a reasonable and lawful differential monitoring proposal; therefore, I believe the DNR must issue an operating license for this facility when and if the plan that the DNR approved is executed, and that execution includes monitoring wells on the periphery.

The alternative is to allow the State to keep this company dangling, twisting in the wind, bleeding money for years and years and years. The State has nothing to lose by doing that. The State is going to still be here, the State will have some kind of funding, but the Plaintiff will eventually run out of money.

. . . I suspect that the ruling I am making today moots the question of the counterclaim, but maybe not. I haven't really looked at that issue. . . . If you wish to do so, either side may bring a motion, but that is the ruling I am making today.

The court added:

I am not going to let the DNR take the position that the type or the location or number of monitoring wells is subject to approval by the DNR with regard to something other than whether they are per . . . specifications. . . . I am not going to let the DNR keep dangling unspecific requirements in front of them, and I agree with the Plaintiff on that.

\* \* \*

[D]ifferential monitoring is out, that's not going to happen.

The court then issued an order requiring that a full operating license be granted, and declaring that

differential monitoring of Cells I and II from each other, or from the so-called "old fill area," by way of a double-liner/double leachate collection system, "tracer system," or other system may not be required as a condition of licensure, but instead Plaintiff shall be entitled to an operating license based on the presently-established monitoring program consisting of the existing wells located at the perimeter and other locations upon the premises."

Subsequently, the court dismissed count II of plaintiff's 1993 cause of action. The court dismissed this count on the ground that the court had rendered the contract claim moot by issuing its order that a license be granted, and rejecting plaintiff's claim for damages. For purposes of arriving at a final order that could be appealed, the parties and the court signed a final judgment and stipulated order, staying the order granting the operating license, dismissing count II of the 1991 suit without prejudice, and dismissing the DNR's counterclaim without prejudice.

## II

### ANALYSIS

Plaintiff raises four issues on appeal, and defendants raise one. We will examine these issues in turn, beginning with defendants' issue on cross-appeal. Because all these issues stem from the trial court's rulings on motions for summary disposition, our review is de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

#### A.

##### Arbitrary and Capricious Denial of the License

Defendants argue that the trial court erred in ruling that the DNR's action in denying the license for want of a system of differential monitoring was capricious and arbitrary. We disagree.

Defendants do not dispute that cell 2 was constructed according to the approved plan, but insist nonetheless that the DNR was within its rights in conditioning the license on plaintiff's acceptance of a monitoring system approved by the DNR. However, there is no dispute that when plaintiff constructed the facility no authority expressly required the double-liner system, and the DNR does not claim that it proposed a monitoring plan as an alternative to the double-liner system that was any less prohibitively burdensome to plaintiff. Although the DNR was authorized to require a reasonable system for monitoring groundwater, in this case the DNR's demands were unreasonable in light of plaintiff's reliance on the DNR-approved construction plan. It is uncontroverted that the double-liner system demanded by the DNR would have required substantial reconstruction of cell 2. Thus, the DNR's position went beyond insisting on adjustments to comply with regulations, and instead amounted to an unreasonable demand that plaintiff reconstruct a facility whose construction specifications the DNR had earlier approved. Here, the DNR's action in approving the initial construction plans for cell 2 but then insisting that plaintiff substantially reconstruct the facility was arbitrary and capricious. *Binsfield v Department of Natural Resources*, 173 Mich App 779, 786; 434 NW2d 245 (1988). Accordingly, we affirm the trial court's ruling which requires the DNR to issue plaintiff an operating license.

## B.

### Unpromulgated Rule

Plaintiff argues that the trial court erred in ruling that plaintiff failed to state a cause of action in claiming that the DNR attempted to enforce an unpromulgated rule. We disagree.

Plaintiff says that the DNR did not promulgate its rule regarding double liners until 1993, well after this dispute arose. Therefore, plaintiff argues that the DNR intended all along to retroactively impose the double liner requirement on plaintiff. The DNR says it could require a double-liner system under then-existing authorities, and that the later promulgation of a rule expressly requiring such monitoring in certain situations does not mean that such a system could never have been required before. Although plaintiff cites authority for the proposition that a regulatory agency may not enforce rules that have not yet been formally promulgated, plaintiff cites no authority for the proposition that an agency is absolutely barred from imposing any licensing requirements that are not, in every particular, formally promulgated as rules. Although "an administrative agency cannot rely upon a guideline or unpromulgated policies in lieu of rules promulgated under the APA," *Department of Natural Resources v Bayshore Assocs*, 210 Mich App 71, 85-86; 533 NW2d 593 (1995), "a rule includes any regulation or standard or instruction of general applicability that implements or applies the law," *Id.* at 85, citing MCL 24.207; MSA 3.560(107). Defendants continue to assert that the "only prudent course of action" is to require the double-liner system of differential groundwater monitoring. At issue, then, is whether the DNR had discretion under existing authority to require the double-liner system, and, if not, whether the DNR and its officials were liable to plaintiff for damages in the matter. Consistent with our earlier ruling upholding the trial court's conclusion that the DNR exceeded its authority in requiring differential monitoring, we conclude here that the DNR did not have discretion to require the double-liner system. The inquiry now turns to the propriety of a claim for damages, against the DNR and its officials, as a remedy for injuries resulting from a capricious or arbitrary exercise of authority.

Plaintiff cites no competent authority for the proposition that a frustrated license seeker may sue a state agency for damages stemming from an erroneous denial of a license. Further, even if this state recognized such a tort as "enforcement of an unpromulgated rule," governmental agencies are generally immune from tort liability under state law for actions taken in furtherance of governmental functions, and agency officers or employees are likewise generally immune from tort liability for actions taken in the course of employment or service. MCL 691.1407; MSA 3.996(107). "When bringing suit against a state agency, plaintiff must plead in avoidance of governmental immunity." *Jones v Williams*, 172 Mich App 167, 171; 431 NW2d 419 (1988).

The pertinent part of plaintiff's 1993 complaint does not allege conduct by the DNR or its operatives that lay wholly outside of the DNR's scope of authority. To the extent that plaintiff requests declaratory and injunctive

relief on this issue, the issue is folded into the original complaint that the DNR withheld the license capriciously and arbitrarily, upon which the trial court ruled and we affirmed, in plaintiff's favor. To the extent that plaintiff seeks an award of damages for denial of due process under federal law, the issue is more appropriately considered in plaintiff's § 1983 claim (which we consider below). For these reasons, the trial court did not err in concluding that plaintiff was not entitled to relief on the ground that the DNR had attempted to enforce an unpromulgated rule.

C.

#### Contract Claim

Plaintiff argues that the trial court erred by ruling that the consent order was not a contract and by holding therefore, that plaintiff had no right to recover contractual damages. We disagree.

"In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991), citing *Detroit Trust Co v Struggles*, 289 Mich 595; 286 NW 844 (1939). Money paid to the DNR under the terms of a consent order can constitute consideration for a contract. *Cordova Chemical Co v Dep't of Natural Resources*, 212 Mich App 144, 152; 536 NW2d 860 (1995). Here, the consent order called for plaintiff to pay substantial fines without challenging their validity. Although payment of the fines themselves, being fulfillment of legal obligations, may not properly be considered consideration, plaintiff's agreement not to contest them may be so considered. "Surrender of even doubtful claims upon honest and reasonable belief in the validity of such claims is legal detriment amounting to consideration." *Barwin v Frederick & Herrud, Inc.*, 62 Mich App 280, 286; 233 NW2d 258 (1975), citing 17 Am Jur 2d, Contracts, § 111, pp 457-458. Plaintiff points to nothing in the consent agreement that may properly be characterized as contractual consideration or assent on the DNR's part. A state actor's performance of a statutory duty can constitute neither consideration nor assent for purposes of creating a contract. *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16, 20-22; 444 NW2d 786 (1989). Here, what plaintiff stood to gain from the consent order was only what the DNR was already legally obliged to do—grant a license for cell 2 upon concluding that all legal requirements were met. Because the consent agreement did not satisfy the elements for a binding contract, the trial court did not err in dismissing plaintiff's claim for damages on that theory.

D.

#### 42 USC 1983 Claim

Plaintiff argues that the trial court erred in dismissing its federal claim under 42 USC 1983. We disagree. 42 USC 1983 provides, in pertinent part, as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

"[A] State is not a person within the meaning of § 1983." *Will v Michigan Dep't of State Police*, 491 US 58, 64; 109 S Ct 2304; 105 L Ed 2d 45 (1989), affirming *Smith v Dep't of Public Health*, 428 Mich 540; 410 NW2d 749 (1987). This exclusion from the reach of § 1983 extends to governmental entities that are considered arms of the state. *Will, supra* at 70. Further, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," *Id.* at 71. Accordingly, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Id.* at 71.

The trial court correctly ruled that plaintiff's pleadings presented a case against the DNR and several of its officials only in their official, not individual, capacities. In the complaint, plaintiff states, "All persons named herein are being sued for injunctive relief *in their official capacities*, and for damages *in their official capacities*."

(Emphasis supplied). The complaint additionally alleged that the “natural persons named herein are and/or were at all times . . . employed in such capacities that their actions and decisions may be fairly said to represent and/or carry out official policy of the State of Michigan, and the MDNR.” There is no indication that any named defendant is being sued in an individual capacity. Because plaintiff, through the complaint’s plain statements, alleges actionable conduct against the DNR and its employees exclusively within their official capacities, the pleading fails to state a claim against any “person” for purposes of § 1983. *Will, supra*, 491 US at 71. Because we affirm the trial court’s dismissal of the § 1983 claim for this reason, we need not reach plaintiff’s other arguments concerning this issue.

E.

#### Regulatory Taking

Plaintiff argues that the trial court erred in dismissing its takings claim on summary disposition. We agree.

Both the federal and state constitutions prohibit the taking of private property for public purposes without due process and just compensation. US Const, Am V and Am XIV, § 1; Const 1963, art 1, § 17 and art 10, § 2. “[T]he Fifth Amendment is violated when landuse regulation ‘denies an owner economically viable use of his land.’” *Lucas v South Carolina Coastal Council*, 505 US 1003, 1016; 112 S Ct 2886; 120 L Ed 2d 798, 813 (1992), adding emphasis and quoting *Agins v City of Tiburon*, 447 US 255, 260; 100 S Ct 2138; 65 L Ed 2d 106. In other words, “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.” *Lucas, supra* at 1019 (emphasis in original). Accordingly, “total regulatory takings must be compensated.” *Id.* at 1026. An exception exists, however, where the regulation at issue simply mirrors a limitation on the use of the land that already existed under applicable property law or nuisance doctrine<sup>2</sup> at the time the property was acquired. *Id.* at 1029-1031. “Where the State seeks to sustain regulation that deprives land of all economically beneficial use . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” *Id.* at 1027.

The trial court ruled that the inquiry in this case under *Lucas* was “did Plaintiff’s ownership estate of the land in question include the unfettered right to build and operate a sanitary landfill without the State’s permission?” Plaintiff conceded that it never possessed such an unfettered prerogative, and therefore the court dismissed the taking claim. However, we agree with plaintiff that the trial court mischaracterized the issue. The question is not did plaintiff have an unfettered right to construct and operate a landfill without state regulation, but whether or not plaintiff had a piece of property of some value that became valueless as the result of arbitrary conduct that went beyond expressly prohibiting what was already illegal.

“The finding of no value must be considered under the Takings Clause by reference to the owner’s reasonable, investment-backed expectations.” *Lucas, supra* at 1034 (Kennedy, J., concurring), citing *Kaiser Aetna v United States*, 444 US 164, 175; 100 S Ct 383; 62 L Ed 2d 332 (1979), and *Penn Central Transportation Co v New York City*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978). Development undertaken with the consent of government “can lead to the fruition of a number of expectancies embodied in the concept of ‘property’ . . . .” *Kaiser Aetna, supra* at 179. As plaintiff points out, this Court in *Miller Bros v Dep’t of Natural Resources*, 203 Mich App 674; 513 NW2d 217 (1994), confirmed that a regulatory taking occurred when the DNR forbade the extraction of oil and gas from the property in question and thus deprived the property of all economically viable use. *Id.* at 679-680. This Court did not concern itself with whether the plaintiff ever had an unfettered right to extract minerals from the land free of DNR regulation, and it is obvious that had that been the relevant inquiry the result would have been different. Defendants attempt to liken plaintiff’s situation to those cited in *Lucas* as examples where a regulatory scheme depriving property of all economical value would effect no taking: “[T]he owner of a lakebed . . . when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land,” or the “owner of a nuclear generating plant, when it is directed to remove all improvements

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<sup>2</sup> “To prevail in nuisance, a possessor of land must prove *significant harm* resulting from the defendant’s *unreasonable interference* with the use or enjoyment of the property.” *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999) (emphasis in original).

from its land upon discovery that the plant sits astride an earthquake fault.” *Lucas, supra*, 505 US at 1029. In this case, when plaintiff constructed cell 2, neither the doctrine of nuisance nor any existing state property law forbade operation of that landfill as constructed. Although a system of differential monitoring reflecting the latest technology might well have made it easier to detect and attend to any environmental damage leaks from the new facility, such leaks may not simply be presumed from the design, which, as we said, the DNR initially approved.

Because the DNR withheld the license for cell 2 for reasons that went beyond already-existing legal requirements for use of the land, the DNR’s actions clearly caused a decrease in the value of the property. Whether that value was reduced to zero, however, as plaintiff contends, is a question that must be decided on evidence presented upon remand. Defendants also point out that plaintiff still possesses cell 2, and that the trial court ordered the DNR to grant an operating license for cell 2. Defendants further say that if this Court upholds that order, then there will have been no taking. However, “whatever may occur in the future cannot undo what has occurred in the past.” *Lucas, supra* at 1032-1033 (Kennedy, J., concurring). Where imposition of a state regulation has effected a taking, “its limited duration will not bar constitutional relief.” *Lucas, supra* at 1033 (Kennedy, J., concurring), citing *First English Evangelical Lutheran Church of Glendale v Los Angeles Co*, 482 US 304, 318; 107 S Ct 2378; 96 L Ed 2d 250 (1987). For these reasons, we hold that the trial court erred in dismissing the takings claim on a motion for summary disposition. The issue merits further evidentiary development on remand.

### III

#### Conclusion

We affirm the trial court’s order requiring defendants to grant plaintiff an operating license for cell 2. We also affirm the trial court’s orders dismissing plaintiff’s claims for damages on a contract theory, pursuant to 42 US 1983, and on the ground that the DNR had attempted to enforce an unpromulgated rule. However, we reverse the court’s order dismissing plaintiff’s claim for damages pursuant to a regulatory-taking theory and remand this claim for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Jane E. Markey